TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~257~~ 45.

THE CAPITAL CITY DAIRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO *EX REL.* ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED APRIL 23, 1900.

(17,727.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 25, 1900.

1 Be it remembered that at a term of the supreme court of Ohio begun and held at the court-room, in the capitol, in the city of Columbus, on the fourth day of January, A. D. 1898, before Hon. William T. Spear, chief justice; Hon. Joseph P. Bradbury, Hon. John A. Shauck, Hon. Thad. A. Minshall, Hon. Marshall J. Williams, and Hon. Jacob F. Burket, judges, among other proceedings the following were had, to wit:

On April 12th, A. D. 1898, the following petition in *quo warranto* and precipe were filed, to wit:

Supreme Court, Franklin County, Ohio.

STATE OF OHIO on the Relation of FRANK S. Monnett, Attorney General Thereof, Plaintiff, *vs.* THE CAPITAL CITY DAIRY COMPANY, a Corporation, Defendant.	Petition in *Quo Warranto.*

The relator, Frank S. Monnett, is the duly elected, qualified, and acting attorney general of the State of Ohio.

The defendant, The Capital City Dairy Company, is a corporation organized and existing under the laws of the State of Ohio.

The said defendant corporation filed its articles of incorporation with the secretary of the State of Ohio, and was created a corporation on June 27th, 1893, and was chartered on said day in accordance with the laws of this State, and thereby granted the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage, and transportation thereof and all things incident thereto. A copy of the articles of incorporation of said corporation is attached hereto and made a part hereof, marked Ex. "A."

2 The said Frank S. Monnett, attorney general of the State of Ohio, gives the court to understand and be informed that the said defendant, The Capital City Dairy Company, has continuously since about the time of its creation up to the present day, within this State, to wit, at and in the county of Franklin, offended against the laws of this State, misused its corporate authority, franchise, and privileges, and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges, and franchises specially inhibited by law in the following particulars and matters, to wit:

First charge. Said defendant corporation has, during the times and at the places aforesaid, manufactured and sold an article in imitation and semblance of natural butter; which said article was made out of animal and vegetable oils and compounded with milk or cream and both; which said article was not then and there in separate and distinct form and in such a manner as would advise consumers of its real character, and was not free from coloring

matter or other ingredients causing it to look like and appear to be butter, and said article was not butter, but was an article made in imitation and semblance thereof.

Second charge. The defendant corporation has, at the times and places above mentioned, manufactured and has offered and exposed for sale and has sold and delivered and had in its possession with the intent to sell and deliver oleomargarine in large quantities—as your relator is informed, in quantities from ten thousand to twenty thousand pounds thereof daily; which said oleomargarine contained coloring matter, to wit, annatto and other coloring matter unknown to relator.

Third charge. The said defendant corporation, during the times and at the places above stated, has manufactured and sold a substance purported and appearing to be butter and having the semblance of butter, but which substance was not butter, but was oleomargarine; but the packages, rolls, and parcels thereof were not distinctly and durably stamped, or painted, or stenciled, or marked in the true name thereof in the ordinary bold-faced capital letters required by the act of May 17th, 1886, entitled "An act to prevent the adulteration of and deception in the sale of dairy products, etc.," 83 O. L., 178.

Fourth charge. Said defendant corporation has refused and still refuses to deliver and furnish to the duly appointed, qualified, and acting inspector and agent of the dairy & food commissioner of this State any sample or quantity of the oleomargarine manufactured by it, although duly demanded by him and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof, contrary to section 4 of the act of March 20th, 1884, entitled "An act to provide against the adulteration of food and drugs"—81 O. L., 67—and said defendant has refused and still refuses to permit said inspector and agent to enter into its factory for any purpose whatsoever, and has refused and still refused to permit him to examine or cause to be examined any of the products manufactured by it.

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Fifth charge. All of said violations of the laws of this State as set forth in the first, second, third, and fourth charges have been made and done by said defendant corporation with full knowledge of the said violations of law and for the expressed purpose and intent of violating said laws and evading the same and for the purpose of deceiving the people of this State and other States as to the real character of its said product, contrary to the act of March 7th, 1890, entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," 87 O. L., 51.

Wherefore the plaintiff prays that the defendant may be adjudged to forfeit its franchise and be ousted therefrom, and that trustees therefore be appointed, according to law, to wind up and settle the affairs of the corporation, collect and pay the outstanding debts, and divide the money and other property which may remain after the payment of the debts and necessary expenses among the stock-

holders, and for such other and further relief as the nature of the case may warrant.

F. S. MONNETT,
E. B. DILLON, *Of Counsel,*
Att'ys for Plaintiff.

Precipe.

To the clerk:

Issue summons on the foregoing petition to the sheriff of Franklin county, Ohio, returnable according to law. Endorse summons: "Action in *quo warranto* and to oust."

F. S. MONNETT,
E. B. DILLON,
Attorneys for Plaintiff.

4 Corporation for profit.

EXHIBIT "A."

These articles of incorporation of the Capital City Dairy Company witnesseth that we, the undersigned,* all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be the Capital City Dairy Company.

Second. Said corporation is to be located at Columbus, in Franklin county, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing, selling, and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage, and transportation thereof, and all things incident thereto.

Fourth. The capital stock of said corporation shall be thirty thousand dollars ($30,000.00), divided into three hundred (300) shares of one hundred dollars ($100.00) each.

In witness whereof we have hereunto set our hands this 26th day of June, A. D. 1893.

DENNIS KELLEY.
EDWARD G. SCHILDER.
HENRY C. PIRRUNG.
GEORGE F. TWITCHELL.
PATRICK J. McNAMEE.

5 THE STATE OF OHIO, } ss:
County of Franklin, }

Personally appeared before me, the undersigned, a notary public in and for said county, this 26th day of June, A. D. 1893, the above-named Dennis Kelley, Edward G. Schilder, Henry C. Pirrung, George F. Twitchell, and Patrick J. McNamee, who each severally acknowledged the signing of the foregoing articles of incorporation

* "All" or "a majority."

to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

T. E. STEELE,
Notary Public, Franklin County, Ohio.

Place ten-cent revenue stamp here.

THE STATE OF OHIO, } ss:
County of Franklin, }

I, Wm. H. Simonton, clerk of the court of common pleas within and for the county aforesaid, do hereby certify that T. E. Steele, whose name is subscribed to the foregoing acknowledgment as a notary public, was at the date thereof a notary public in and for said county, duly commissioned and qualified and authorized as such to take said acknowledgment, and, further, that I am well acquainted with his handwriting and believe that the signature to said acknowledgment is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Columbus, this 27 day of June, A. D. 1893.

[SEAL.] WM. H. SIMONTON, *Clerk.*

☞ Clerks are required to use this certificate and not attach their own. ☜

Place ten-cent revenue stamp here.

[Endorsed:] Form A. Articles of incorporation of the —— Company. Filed in the office of the secretary of state, at Columbus, Ohio, on the — day of ——, A. D. 189–, and recorded in volume —, page —, of the records of incorporations. —— ——, secretary of state. Remarks: Articles of incorporation must be subscribed by at least five persons, a majority of whom must be citizens of Ohio. They may be acknowledged before any officer who is authorized to take acknowledgments of deeds, and the official character of the officer taking such acknowledgment must be certified to by the clerk of the court of common pleas of the county in which the acknowledgment is made.

6 And afterwards and on the same day, to wit, April 12th, A. D. 1898, the following summons in *quo warranto* was issued:

THE STATE OF OHIO, } ss:
City of Columbus, }

Supreme Court of Ohio.

To the sheriff of Franklin county, Greeting:

You are commanded to notify the Capital City Dairy Company, a corporation, that Frank S. Monnett, attorney general within and for the State of Ohio, filed a petition in the nature of a *quo warranto*

against them in the supreme court of the State of Ohio, and that they are required to demur or answer to said petition within thirty days from the return day of this writ.

You will make due service and return this writ April 25th, 1898.

Witness my hand and the seal of the supreme court of Ohio this thirteenth day of April, A. D. 1898.

[Seal Supreme Court.]

JOSIAH B. ALLEN,
Clerk of the Supreme Court of Ohio,
By CHAS. C. PICKERING, *Deputy.*

And afterwards, to wit, on April 25th, 1898, said summons was returned and filed, endorsed as follows:

STATE OF OHIO, } ss:
Franklin County, }

Received this writ April 13th, in the year of our Lord one thousand eight hundred and ninety-eight, at 4 o'clock p. m., and, pursuant to its command, on April 18th, in the year of our Lord one thousand eight hundred and ninety-eight, I served the within-named defendant, The Capital City Dairy Company, a corporation, by personally handing a true and duly certified copy of this writ, with all the endorsements thereon, to Dennis Kelly, president of the said Capital City Dairy Company, a corporation.

WHEELER J. YOUNG, *Sheriff,*
By THURMAN THOMPSON, *Dpy.*

Fees, $1.25.

7 And afterwards, to wit, on the 21st day of May, A. D. 1898, the following answer of defendant to petition of plaintiff was filed:

Answer in Quo Warranto.

1. And now comes the said The Capital City Dairy Company and for a first answer to the petition herein says that it admits that the relator, Frank S. Monnett, is the duly elected, qualified, and acting attorney general of the State of Ohio; that the defendant, The Capital City Dairy Company, is a corporation organized and existing under the laws of the State of Ohio; that it filed its articles of incorporation with the secretary of the State of Ohio and was created a corporation, as alleged, and was thereby granted the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage, and transportation thereof and all things incident thereto; that a copy of the articles of incorporation of said corporation is attached to the petition herein.

And this defendant, further answering, says that it denies the statements and allegations contained in each of the five charges of the petition and denies each and every statement and allegation in the petition contained not in this pleading specifically admitted to be true.

The defendant denies that it has continuously since about the time of its creation up to the present day, or at any time during said period, offended against the laws of this State, misused its corporate authority, franchise, and privilege and assumed franchises and privileges not granted to it, and assumed and exercised rights, privileges, and franchises specially inhibited by law, as charged in the first, second, third, *fourth, and fifth* charges of said petition. It denies that it has at the times and places charged or at any other time and place manufactured and sold an article in imitation and semblance of natural butter, which said article was made out of animal and vegetable oils and compounded with milk or cream and both, which said article was not then and there in separate and distinct form and in such manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients causing it to look like and appear to be butter, said article not being butter, but being an article made in imitation and semblance thereof.

8 This defendant corporation further represents to the court and avers that oleomargarine is an article of commerce, and its ingredients, constituents, nature, and character are well known; that it is a nutritious and wholesome article of food, in almost universal use among the people; that it is, like butter, an artificial compound; that butter closely resembles it in appearance, both substances being naturally of a light-yellow color. It denies that in manufacturing its product it has sought to imitate any other product or to produce any imitation of or substitute for any other compound. It denies that it has manufactured or sold any oleomargarine containing annatto or any other coloring matter except during a short period of time, to wit, for about 60 days in mid-winter, when the color of all natural butter was white and when the color of its product, by reason of the use of such coloring matter, was yellow. It avers that said oleomargarine so manufactured was manufactured solely for the purpose of selling and delivering the same in the unbroken and original packages to customers in other States than the State of Ohio, and that the only coloring matter used was annatto, which was and is a harmless vegetable coloring matter.

And this defendant protests that it desires to comply with and obey any and all valid laws regulating the manufacture and sale of its product, but respectfully represents to this court and avers that the statute or statutes in force in this State purporting to prohibit the use of coloring matter in the manufacture of this product are repugnant to and in contravention of the constitution of the State of Ohio and the Constitution of the United States.

This defendant corporation denies that it has at any time or place manufactured and sold oleomargarine or any substance purporting and appearing to be butter and having the semblance of butter without distinctly labelling each package, as provided by law.

This defendant corporation denies that it has refused and still refuses to deliver to the duly appointed, qualified, and acting inspector and agent of the dairy & food commissioner of this State any sample or quantity of the oleomargarine manufactured by it or any reasonable quantity thereof, and denies that it has refused and

still refuses to permit any officer authorized by law to enter into its factory, or has refused to permit such officer to examine or cause to be examined any of the products manufactured by it.

9 This defendant corporation denies that it has violated any of the laws of the State of Ohio, or that it has endeavored, whether by violating the law or otherwise, to deceive, or that it ever has deceived, the people of this State and other States as to the real character of its product, to wit, oleomargarine.

This defendant further represents and avers that no substance was ever manufactured or sold by it except oleomargarine; that all the oleomargarine ever manufactured or sold by it was so manufactured and sold in distinct and separate form, labelled in black letters at least five-eighths of an inch square "oleomargarine," and the name and per cent. of each ingredient therein, as provided by law. Said defendant says that it has expended thousands of dollars in advertising its business as a manufacture- and jobber of oleomargarine; that it has never pretended to manufacture or sell any butter; that it has never sold any oleomargarine except as such, and that all oleomargarine shipped from its factory or manufactured or sold thereat was not only labelled, stenciled, and marked as required by the statutes of this State, but also labelled and marked as required by the statutes of the United States and the regulations of its Internal Revenue Department, each package containing revenue stamps and labelled "oleomargarine," and in short this defendant says that it has never manufactured or sold any oleomargarine except as such, and has never desired to sell any except as such.

It further says that the entire fourth charge in plaintiff's petition is based upon a personal difficulty which happened on one isolated occasion between one of its officers and one of the agents of the dairy and food commissioner, who was not an assistant commissioner.

This defendant further denies that it has ever violated the laws of this State or done anything, whether unlawful or not, for the purpose of deceiving the people of this country as to the real character of its product, contrary to the act of March 7, 1890, or any other provisions of the laws of Ohio. It says, on the contrary, it has gone to great trouble and expense to advise the public of the fact that it manufactured and sold oleomargarine and nothing else.

2. And now, for a second defense, the defendant here adopts all and singular the averments and statements in the foregoing first answer contained as fully as if the same were here again specially stated, and says that it did on several occasions since Jan-

10 uary 1, 1898, and prior to March 1, 1898, manufacture some small quantities of oleomargarine containing a harmless and wholesome coloring matter, which said coloring matter or no other ingredient therein contained caused it to look like or appear to be butter; that all of the oleomargarine so made was manufactured and sold in separate and distinct form, labelled oleomargarine, as provided by law, with the name and per cent. of each ingredient therein, and was sold only as oleomargarine; that it was so manufactured for the purpose of being sold to customers at points in other

States outside the State of Ohio; that it was not sold or offered to be sold or kept in defendant's possession with intent to sell the same within the State of Ohio; that it was only sold at points outside of the State of Ohio, and to such points shipped in separate, original, and unbroken packages. The defendant further avers that the said oleomargarine manufactured by it, including that so manufactured with coloring matter as herein admitted, is a wholesome, palatable, and nutritious article of food and in no way deleterious to the public health or welfare. It is of the natural color of butter and looks like butter, and was colored when and as herein admitted by harmless ingredients to render it more attractive to customers, and not for the purpose of making it appear to be anything else than oleomargarine. Said oleomargarine is of a light-yellow color and looks like butter, and cannot be made to look unlike butter unless the manufacturer is allowed to color it. It further avers that oleomargarine is and during all the time referred to was a recognized article of commerce, regulated as such for revenue purposes by the act of Congress of August 2, 1886.

This defendant corporation respectfully represents that the use of such coloring matter in the manufacture of its oleomargarine, as above set forth, was not contrary to its corporate charter or in violation of law.

3. And now, for a third defense, the defendant here adopts all and singular the averments and statements in the foregoing first and second answers contained as fully as if the same were here again specially stated, and avers that the use of a harmless and wholesome coloring matter, as hereinbefore admitted, is not in contravention of or contrary to the statutes of this State prohibiting the sale of coloring matter in the manufacture of oleomargarine, for the reason that both of said statutes, to wit, the act of March
11 7, 1890, entitled an "Act to prevent deception in the sale of dairy products and to preserve the public health," and the act of May 16, 1894, entitled an "Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio," are laws passed in the interest of the public health and to prevent the use of deleterious and injurious substances in the manufacture and preparation of food, and do not prohibit in the manufacture of oleomargarine the use of harmless and wholesome coloring matter such as is used and by law permitted to be used in the manufacture of butter.

And this defendant corporation further avers and represents to the court that if such use is prohibited by said statutes, then said statutes and each of them to that extent are unconstitutional and void and in contravention of and repugnant to the provisions of the constitution of the State of Ohio, and also are in contravention of and repugnant to the provisions of the Constitution of the United States, and especially the fourteenth article of amendment.

4. And now, for a fourth defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, and third answers contained as fully as if the same were here again specially stated, and avers that if the use of coloring matter,

as set forth above, be unlawful, it is because inhibited by section one of an act of the General Assembly of the State of Ohio passed May 16, 1894, and entitled an "Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio;" which said section one is in the words and figures following, to wit:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That no person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver any oleomargarine which contains any *methly* (methyl) orange, butter yellow, annatto, analine dye or any other coloring matter."

And this answering defendant says that because said statute by its terms makes or purports to make it unlawful to use any coloring matter, however healthful or harmless, in the manufacture of oleomargarine for any purpose, it is repugnant to the constitution and bill of rights thereof of the State of Ohio and is therefore unconstitutional and void.

5. And now, for a fifth defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, third, and fourth answers contained as fully as if the same were here again specially stated, and further avers that said section one of said act of May 16, 1894, above quoted and all proceedings under or by virtue thereof against this defendant are unlawful and void, because said section one of said act is in contravention of the Constitution of the United States and especially section eight of article one of said Constitution and section one of the fourteenth article of amendment.

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6. And now, for a sixth defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, third, fourth, and fifth answers contained as fully as if the same were here again specially stated, and says that the petition avers that this defendant has violated the provision of an act of the General Assembly of the State of Ohio passed March 7, 1890, and entitled an "Act to prevent deception in the sale of dairy products and to preserve the public health," which reads as follows:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That no person, by himself or his agent, or his employé, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from pure unadulterated milk or cream from the same, nor compound with or add to milk, cream or butter any acids or other deleterious substance or animal fats or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food, in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale or offer for sale any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this State or elsewhere.

SECTION 2. For the purpose of this act the terms 'natural butter and cheese,' 'natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese made from unadulterated milk or cream, butter or cheese, the product of the dairy,' and butter or cheese, shall be understood to mean the products usually known by the terms butter and cheese, and which butter is manufactured exclusively from pure milk or cream, or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any
13 harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine, in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look or appear to be butter, as above defined.

SECTION 3. Whoever violates the provision of this act shall be guilty of a misdemeanor, and be punished by a fine of not less than one hundred dollars, nor more than five hundred, or not less than six months' nor more than one year's imprisonment, for the first offense, and by imprisonment for one year for each subsequent offense.

SECTION 4. This act shall take effect from and after the first day of May, 1890."

This defendant corporation says that said statute, so far as it relates to oleomargarine, was repealed by the terms of section 6 of the act of May 16, 1894, entitled an "Act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio." It further says that should said law be held not to have been repealed because of the unconstitutionality of section one of the act of May 16, 1894, or for any other reason, that it is nevertheless inoperative and void because it is by its terms repugnant to and in contravention of the constitution of the State of Ohio, including the bill of rights thereof, and repugnant to and in contravention of the Constitution of the United States, and especially section 8 of article one and the fourteenth amendment thereto.

7. And now, for a seventh defense, the defendant here adopts all and singular the averments and statements in the foregoing first, second, third, fourth, fifth, and sixth answers contained as fully as if the same were here again specially stated, and says that this court has not jurisdiction to hear and determine this controversy, and that this proceeding should not be further entertained or heard by the court for the reason that the charges made against this defendant by said petition are all of them crimes under the statutes of Ohio, if said statutes are valid and said petition states any colorable cause of action against the defendant, and that therefore this proceeding cannot be prosecuted, and judgment therein against the defendant ought not to be rendered, and, further, for the reason that no conviction has ever been had in any of the courts of this State against the defendant for the violation of any statute for the breach

of which it is here claimed the defendant has rendered itself liable to the judgment asked in the petition; and this defendant
14 respectfully represents to the court that this proceeding is in contravention of the Constitution of the United States.

By THOMAS E. STEELE AND
JOHN S. GILL, *Of Counsel.*

STATE OF OHIO, *Franklin County,* } ss:

Dennis Kelly, being first duly sworn, says that he is the president of the defendant corporation; that the allegations and denials contained in the foregoing answer are true as he believes.

DENNIS KELLY.

Sworn to before me and signed in my presence this 21st day of May, 1898.

[NOTARIAL SEAL.]

CHARLES F. STEELE,
Notary Public, Franklin Co., Ohio.

And afterwards, to wit, on the 20th day of June, A. D. 1898, the following demurrer of plaintiff to the answer of defendant was filed:

Demurrer.

Now comes Frank S. Monnett, attorney general of the State of Ohio, the relator in the foregoing cause, and demurs to the answer of the defendant herein as follows:

1st. Said relator demurs to the third defense set forth in the defendant's answer for the following reasons:

I. The facts stated in said third defense do not constitute a defense to the petition.

II. The acts and laws set forth in said third defense are constitutional and are good and valid laws of the State of Ohio.

2nd. The relator demurs to the fourth defense of the answer for the following reasons:

I. That the facts stated and allegations set forth in said fourth defense do not constitute a defense to the plaintiff's petition.

II. Said acts and laws set forth in said fourth defense are constitutional and are good and valid laws of the State of Ohio.

3rd. The relator demurs to the fifth defense of the answer for the following reasons:

15 I. That the facts stated and allegations set forth in said fifth defense do not constitute a defense to the plaintiff's petition.

II. Said acts and laws set forth in said fifth defense are constitutional and are good and valid laws of the State of Ohio.

4th. The relator demurs to the sixth defense of the answer for the following reasons:

I. That the facts stated and allegations set forth in said sixth defense do not constitute a defense to the plaintiff's petition.

II. Said acts and laws set forth in said sixth defense are constitutional and are good and valid laws of the State of Ohio.

5th. The relator demurs to the seventh defense in defendant's answer for the reason that the facts stated and allegations made in said seventh defense do not constitute a defense to the plaintiff's action herein.

F. S. MONNETT,
Attorney General of the State of Ohio.

E. B. DILLON, *Of Counsel.*

And afterwards and on the same day, to wit, June 20th, A. D. 1898, the following reply of plaintiff to the answer of defendant was filed:

Reply.

Now comes the relator, Frank S. Monnett, attorney general of the State of Ohio, and for his reply to the answer herein says:

1st. The relator denies that the said defendant corporation has used a coloring matter only during about sixty days in mid-winter and for the purposes and reasons in said answer stated, and says that said defendant corporation has used said coloring matter at all seasons of the year, as averred in the petition herein.

Said relator denies that said oleomargarine was manufactured solely for the purpose of selling and delivering the same in an unbroken and original package to the customers in other States than the State of Ohio.

2nd. For reply to the second defense the relator denies that all of the oleomargarine so made by said defendant company was manufactured and sold in separate and distinct form and labeled as provided by law, and denies that it was so manufactured for the purpose of being sold to customers outside of the State of Ohio, but
16 that, on the contrary, the relator says that said colored oleomargarine was manufactured and kept in defendant's possession with intent to sell the same, not only outside of the State of Ohio, but within the State of Ohio.

The relator further denies that the natural color of oleomargarine is a light-yellow color, and denies that it cannot be made to look "unlike" butter unless the manufacturer is allowed to color it.

Wherefore the plaintiff re-avers the allegations and charges in the petition contained and prays for a judgment of ouster, etc., as in his petition.

F. S. MONNETT,
Attorney General of the State of Ohio.

E. B. DILLON, *Of Counsel.*

And afterwards, to wit, on the 12th day of December, A. D. 1898, the following motion by plaintiff for the appointment of a special master commissioner was filed:

Motion.

Now comes the plaintiff and represents to the court that certain issues of fact are made in this cause between the plaintiff and de-

fendant for the determination of which considerable evidence must be taken; that evidence must be taken not only in the city of Columbus, Ohio, but at Cleveland, Ohio, and Detroit, Michigan, and several other places within and without this State; that it would be to the interest of justice and would facilitate this cause to have a special master commissioner appointed to take all of the testimony, with powers and duties to be limited by the court.

Plaintiff therefore moves the court to appoint a special master commissioner in this cause.

FRANK S. MONNETT,
Att'y General.

E. B. DILLON,
Of Counsel for Pl'ff.

Consent.

The defendant for-going on this 12th day of December, A. D. 1898, acknowledges notice of the foregoing motion and consents thereto, and further consents that the person recommended by the plaintiff, to wit, R. E. Westfall, may act as such commissioner.

THOMAS E. STEELE,
Att'y for Defendant.

17 And afterwards, to wit, December 20th, A. D. 1898, the following order was made by the court on motion of plaintiff for the appointment of a special master commissioner:

Ordered by the court, upon consent of parties, that said motion be, and the same is hereby, allowed; and, by like consent, R. E. Westfall, Esq., is appointed special master commissioner in said cause, and he is hereby authorized and empowered, upon giving reasonable notice to the parties thereto, to take such testimony and proofs, either within or without the State, as relator or respondent desire, pertinent to the issue in this proceeding and raised by the pleadings filed herein, and to issue all necessary processes and *subpœnas duces tecum* for the attendance of witnesses and the production of such books and such other written evidence as may be competent, and to administer all necessary oaths, and to report in writing all such examinations and testimony to this court without unnecessary delay.

Thereupon appeared said R. E. Westfall, Esq, and took the oath required by law.

O. B. No. 16, pg. 244.

And afterwards, to wit, on May 3rd, A. D. 1899, the following motion by defendant to set time for taking testimony and filing briefs and notice of motion were filed:

Motion.

Now comes the defendant, The Capital City Dairy Company, and moves the court to set a time by which the plaintiff herein must conclude taking testimony-in-chief to support the averments of its

petition, and also to set a time in which the defendant may take its testimony in this case; and, further, to set a time after the conclusion of the testimony in which the briefs in the case shall be filed.

The defendant also prays that an oral argument may be granted.

THOMAS E. STEELE,
Attorney for Defendant.

Notice.

Frank S. Monnett and E. B. Dillon:

You are hereby notified that a motion, a true and complete copy of which is hereto attached, has been filed by the defendant in the above-entitled cause in the supreme court of Ohio, and will be for hearing before said court on Thursday, May 4, 1899, at 8.30 a. m., or as soon thereafter as counsel can obtain the attention of the court.

18

THOMAS E. STEELE,
Attorney for Defendant.

Service of the above acknowledged.

F. S. MONNETT,
Att'y General.

And afterwards, to wit, on May 9th, A. D. 1899, the following order was made by the court on motion of defendant to set time for taking testimony, etc.:

Ordered by the court that said motion be, and the same is hereby, allowed, plaintiff to close its testimony by May 10th, 1899, and defendant to file its testimony by September 15th, 1899. Request for oral argument noted.

O. B. No. 16, pg. 386.

And afterwards, to wit, on September 29th, A. D. 1899, the following motion by plaintiff for extension of time to file briefs was filed:

Motion.

The plaintiff moves the court for thirty days' time in which to file brief in this cause for the following reasons:

1st. Oral argument has been asked for in this cause, and the granting of this motion will not interfere with or delay the hearing thereof.

2nd. This cause being one in *quo warranto*, and there being a dispute as to the facts, it was necessary that testimony be taken. This court gave the defendant until September 15th, 1899, in which to complete its testimony, and it was therefore impossible for plaintiff to compile a brief until this testimony was in. On September 21st, 1899, the sole counsel for defendant, Mr. Thomas E. Steele, requested in writing that the plaintiff consent to the defendant taking its testimony by October 15th, 1899; which consent, for good reason shown, was given.

Plaintiff's brief is all ready except as to those matters which will be embraced in the defendant's testimony, and the case is one of such importance that plaintiff could not safely or properly file a brief until that testimony is in.

E. B. DILLON,
Of Counsel for Plaintiff.

19 COLUMBUS, OHIO, *September 29th*, 1899.

I hereby certify to the court that Mr. Thomas E. Steele is sole counsel for the defendant, and that he has left the city of Columbus, Ohio, on business and will not return before Tuesday, October 3rd, A. D. 1899, and that it is impossible to serve personal copy of this motion on him within that time. Notice of this motion and the object thereof has this day been sent to said counsel by mail.

E. B. DILLON, *Of Counsel.*

And afterwards, to wit, on October 3rd, A. D. 1899, the following notice of the above motion was filed:

Notice of Motion.

The defendant hereby acknowledges notice of the filing of the motion of plaintiff on September 29th, 1899, asking for additional time in which to file brief.

THOMAS E. STEELE,
Attorney for Defendant.

And afterwards, to wit, on October 10th, A. D. 1899, the following order was made by the court on motion of plaintiff for an extension of time to file brief:

Ordered by the court that said motion be, and the same is hereby, allowed. Time extended to November 1st, 1899.

O. B. No. 16, pg. 458.

And afterwards, to wit, on April 10th, A. D. 1900, the following order was made by the court:

This cause coming on to be heard upon the petition and answer, testimony, and argument of counsel, upon consideration thereof the court find that the averments of the petition are true, and that the defendant, the said The Capital City Dairy Company, has offended against the law of this State, misused its corporate authority, franchise, and privileges and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges, and franchises specially inhibited by law, whereby it has forfeited its corporate right, privileges, and franchises.

20 It is therefore considered and adjudged that said corporation be ousted and altogether excluded from such corporate rights, privileges, and franchises, and that said corporation be dissolved.

It is therefore ordered that Charles D. Beardsley and Harry P. Junk be, and they hereby are, appointed trustees of the creditors

and stockholders of the said corporation, with full power to settle the affairs of the corporation, to collect and pay debts, and to divide among the stockholders of said corporation the money and property remaining, and that they report their proceedings to this court for confirmation.

And it is ordered that said trustees, before entering upon the duties of their office, give bond in the sum of $50,000.00, conditioned according to law, with sureties to the approval of this court.

The said defendant, its officers and agents, are hereby directed and required to turn over to said trustees all money, property, books, deeds, notes, bills, obligations, and papers of every description within the custody, power, or control of the officers of said defendant or either of them belonging to said defendant or anywise necessary to the settlement of the affairs or for the discharge of the debts and liabilities of said defendant.

It is further ordered that said trustees proceed forthwith to cause an inventory and appraisement of said property and effects to be made and filed in court, the said appraisal to be made under oath by two competent, disinterested citizens of Franklin county.

Thereupon came the said Charles D. Beardsley and Harry P. Junk and present their bond in the sum of fifty thousand dollars in due form, with the Fidelity & Deposit Company of Maryland as surety; which bond and surety are approved by the court.

On motion of the said defendant, this court doth order that it be certified and made part of the record in this case, and of the judgment rendered herein by this court at the present term thereof, to wit, on the 10th day of April, A. D. 1900, and of the entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio, passed March 7th, 1890, and entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," and an act of the General Assembly, passed May 16th, 1894, entitled "An act to prevent fraud and deception
21 in the manufacture and sale of oleomargarine and promote public health in the State of Ohio," and an act of the General Assembly, passed May 17th, 1886, entitled "An act to prevent adulteration of and deception in the sale of dairy products, supplementary to chapter 11, title I, part 4, of the Revised Statutes, as amended by an act of the General Assembly, passed March 21st, 1887, entitled "An act to amend section 1, 6, and 7 of an act passed May 17th, 1886, to prevent adulteration and deception in the sale of dairy products, and section 4 of an act of the General Assembly passed March 20th, 1884, that act being entitled "An act to provide against the adulteration of food and drugs," were severally laws of said State and were and are of binding force and validity against the said defendant.

The court further order that it be certified that the said defendant on the hearing of the said cause claimed and asked this court to hold that each and all of said acts were and are in violation of and repugnant to section 8 of article I of the Constitution of the United States, which ordains that "Congress shall have power to regulate

commerce with foreign nations, and among the several States, and with the Indian tribes," and that they severally were a violation of and repugnant to the 5th article of amendment to the Constitution of the United States, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and that they severally were repugnant to and in violation of section 1 of the 14th article of amendment to the Constitution of the United States, which provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of the — United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and this court orders it to be further certified that this court decide and adjudge that each and all of said acts herein mentioned, passed by the General Assembly aforesaid, were not in violation of nor repugnant to said section 8 of article I of the Constitution of the United States, and are not repugnant to or in violation of the 5th article of amendment to the Constitution of the United States, and are not repugnant to or in violation of the 14th article of amendment to the Constitution of the United States, and decided and adjudged that each and all of said acts were and are valid and
22 binding in their entirety upon the said defendant, and thereupon rendered said judgment, which is founded upon said decision of this court, that said acts were and are of binding force and validity against the said defendant, and this court rendered final judgment against the defendant, as is shown by the entry heretofore made of the said judgment and order; and it is further ordered by this court to be certified that the question of the validity of said acts of the General Assembly in the particulars mentioned hereinbefore were severally drawn in question on the hearing and decision of this case as being repugnant to and in violation of section 8 of article I of the Constitution of the United States, and as being repugnant to and in violation of the 5th article of amendment to the Constitution of the United States, and as being repugnant to and in violation of section 1 of the 14th article of amendment to the Constitution of the United States, and that the decision of the court was in favor of the validity of said acts and each of them in their entirety as against the said defendant; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had.

O. B. No. 17, pp. 130, 149 & 150.

And afterwards, to wit, on April 19th, A. D. 1900, the following order was made by the court:

A writ of error to the Supreme Court of the United States having been allowed by the chief justice of the supreme court of Ohio, who thereupon issued a citation to the plaintiff according to law and fixed the bond required by the statute in such cases at the sum of

forty thousand ($40,000.00) dollars, to be given by the defendant, with sureties to the approval of the clerk of this court, and said defendant having duly filed said bond, with William D. Park and Howard C. Park as sureties thereon, to the approval and satisfaction of the clerk of this court, it is ordered that further proceedings under the former judgment in this case be suspended, provided the defendant within sixty days from and after April 10th, 1900, have said writ of error returned to the clerk of the Supreme Court of the United States, with necessary papers and certificates annexed thereto, and lodge with the clerk of this court within said time a copy of the writ of error heretofore allowed, which said stay shall be effective until otherwise ordered by this court or by the Supreme Court of the United States.

Approved.

SHAUCK, *C. J.*

O. B. No. 17, pp. 150, 151.

23 STATE OF OHIO, } *ss:*
City of Columbus, }

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings in the case of The State of Ohio *ex rel.* Attorney General against The Capital City Dairy Company, within mentioned, with all things concerning the same, before the judges within named, in a certain authenticated transcript to this writ attached, do send, as within we are commanded.

In witness whereof I, Josiah B. Allen, clerk of the supreme court of Ohio, have set my hand and seal of said court, this twentieth day of April, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

24 In the Supreme Court of Ohio.

THE STATE *ex Rel.* ATTORNEY GENERAL
v.
THE CAPITAL CITY DAIRY COMPANY. } No. 6000.

1. The police power of the State is properly exercised in the prevention of deception in the sale of dairy products, and in the protection of the health of the people, and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guaranteed by the constitution.

2. The acts of March 7, 1890 (87 O. L., 51), and May 16, 1894 (91 O. L., 274), and of May 7, 1886 (83 O. L., 178), as amended March 21, 1887 (84 O. L., 182), and of March 20, 1884 (81 O. L., 67), (the purpose of which acts is to prevent deception in the sale of dairy product and to preserve the public health), are a reasonable exercise of the police power and do not contravene any section of the constitution.

3. The mere fact that the criminal laws of the State provide for the punishment by fine of those who offend against the above-recited sections is not a bar to a proceeding in *quo warranto* to oust a corporation engaged in the manufacture of oleomargarine from the exercise of its rights to be a corporation.

4. Where the manner of conducting a business which the State's charter gives power to a company to conduct as a corporation is in disregard and defiance of the laws of the State relating to that business, an abuse of the power results, and *quo warranto* may properly be invoked to stop the abuse, and if the abuse be flagrant, to oust the corporation.

25

(Decided April 10, 1900.)

Quo warranto.

F. S. Monnett and E. B. Dillon, for the State.
Thomas Ewing Steele, for defendant.

SPEAR, *J.*:

The defendant is an Ohio corporation, chartered June 27, 1893, and thereby granted the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine and the material and utensils employed in the manufacture, storage, and transportation thereof and all things incident thereto. Its principal place of business is the city of Columbus. The complaint is that the defendant has continuously since about the time of its creation offended against the laws of the State, misused its corporate authority, franchises, and privileges, and assumed franchises and privileges not granted to it, and has assumed and exercised rights, privileges, and franchises specially inhibited by law in these particulars, to wit: 1. It has manufactured and sold an article in imitation and semblance of natural butter, which article was made of animal and vegetable oils and compounds with milk or cream or both,

26

which was not in separate and distinct form and in such manner as would advise consumers of its real character, and was not free from coloring matter or other ingredients, causing it to look like and appear to be butter, which said article was not butter, but was an article made in imitation and semblance thereof. 2. It has manufactured and has offered and exposed for sale and has sold and delivered and held in its possession with intent to sell and deliver, in quantities from ten thousand and twenty thousand pounds daily, oleomargarine containing coloring matter, namely, annatto and other coloring matter to relator unknown. 3. It had manu-

factured and sold a substance purporting and appearing to be butter and having the semblance of butter, but which was not butter, but was oleomargarine, and the parcels and rolls thereof were not distinctly and durably stamped or painted or marked in the true name thereof in ordinary bold-faced capital letters. 4. It has refused and still refuses to deliver and furnish to the duly appointed, qualified, and acting inspector and agent of the dairy and food commissioner of the State any sample or quantity or oleomargarine manufactured by it, although duly demanded by him, and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof, and has refused and still refuses to permit said inspector and agent to enter its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the
27 products manufactured by it; and, further, that all of said violations of law have been made and done by the defendant with full knowledge of the said violations and for the express purpose and intent of violating and evading said laws for the purpose of deceiding the people of this and other States as to the real character of its said product, contrary to the act of March 7, 1890, entitled "An act to prevent deception in the sale of dairy products and preserve the public health."

Evidence in support of these charges was introduced on the part of the State. No evidence was offered by defendant. Without going into detail-, it is sufficient to say that the evidence compels the conclusion that the acts charged have been committed by defendant, and that their frequency and the conduct of the officers of the defendant in relation thereto warrant the further conclusion that the acts were committed willfully and with the intent to disregard the provisions of statute and to defy the officers of the State whose specific duty it is to enforce the law in this behalf; so that the natural results of all such acts are presumed to have been intended. Objection is offered to the competency of testimony as to acts of the defendant since the commencement of this proceeding; but inasmuch as the matter of final judgment depends somewhat upon the disrection of the court, we regard this evidence competent as bearing upon the animus, purpose, knowledge, and intent of the defendant and as calculated to aid the court in the exercise of a proper discretion respecting the character of the judgment to be entered.

28 The defense offered is twofold: First, that the acts a violation of which is charged are unconstitutional as being an arbitrary and unauthorized attempt to interfere with the natural right to conduct a legitimate business which is beneficial to the public as well as profitable to its promoters, and, second, that this proceeding cannot be maintained because, if the law- referred to be valid, their violation is punishable in a criminal proceeding, and a definite, adequate penal sentence may follow a conviction in such proceeding; and, beside, the right to manufacture and vend oleomargarine is not a franchise, and its abuse, should the same be shown, is not the abuse or misuse of a franchise and not the proper

subject of a *quo warranto* proceeding; hence relator has mistaken his remedy, and its petition should be dismissed.

The statutes claimed to have been violated are the act of March 7, 1890, entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," annotated in Bates' Statutes as sections 4200–'13–'14, by which it is provided that—

(4200–'13.) "No person by himself or his agent, or his employé, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from pure unadulterated milk or cream from the same, nor compound with or add to milk, cream or butter, any
29 acids or other deleterious substance, or animal fats, or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale, or offer for sale, any article, substance, or compound made, manufactured or produced in violation of the provisions of this section whether such article, substance or compound shall be made or produced in this State or elsewhere."

(4200–'14) "For the purpose of this act, the terms 'natural butter and cheese,' 'natural butter or cheese produced from pure unadulterated milk or cream from the same, butter and cheese, made from unadulterated milk or cream, butter or cheese, the product of the dairy,' and butter or cheese shall be understood to mean the products usually known by the terms butter and cheese and which butter is manufactures exclusively from pure milk or cream or both, with salt and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter, or other ingredient causing it to look like or to appear
to be butter, as above defined."

30 Also the act of May 16, 1894, having a like title, now section 4200–'16, which reads:

"No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any *methly* (methyl) orange, butter yellow, annatto, analine dye, or any other coloring matter."

Also the first section of the act of May 17, 1886, as amended March 21, 1887, entitled "An act * * * to prevent adulteration and deception in the sale of dairy products," now section 4200–'30, which provides:

"That no person shall sell, expose or offer for sale or exchange, any substance purporting, appearing, or represented to be butter or cheese, or having the semblance of either butter or cheese, which substance is not made wholly from pure milk or cream, salt and harmless coloring matter, unless it is done under its true name, and

each vessel, package, roll or parcel of such substance has distinctly and durably painted, stamped, stenciled or marked thereon, the true name of such substance in ordinary bold-faced capital letters not less than five-line pica in size and also the name of each article or ingredient used or entering into the composition of such substance in ordinary bold-faced letters not (less) than pica in size, or sell or dispose of in any manner to another, any such substance without delivering with each amount sold or disposed of, a label on
31 which is plainly or legibly printed in ordinary bold-faced capital letters not less than five-line pica in size, the true name of such substance, and also the name of such articles used and entering into the composition of such substance in ordinary bold-faced letters, not less than pica in size, if the same be not made wholly from pure milk or cream, salt and harmless coloring matter, and the words 'butter,' 'creamery,' or 'dairy,' or any word or combination of words embracing the same shall not be placed on any vessel, package, roll, or parcel containing any imitation dairy product or substance not made wholly from pure milk or cream, salt and harmless coloring matter."

Also section 4 of the act of March 20, 1884, entitled "An act to provide against the adulteration of food and drugs," now section 4200-7, which provides that:

"Every person manufacturing, offering or exposing for sale, or delivering to a purchaser, any drug or article of food included in the provisions of this act, shall furnish to any person interested or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession."

It is not intended here to enter into a general dissertation respecting the origin or method of manufacture of oleomargarine or its usefulness or healthfulness when manufactured of pure and clean materials and in a cleanly and wholesome manner. It is sufficient to say that it is not, within the meaning of these acts, butter
32 when made in any manner and of any ingredients; that in its natural state it is nearly white in color, while butter in its natural state — in general (although not always) yellow; but oleomargarine when colored can be made and is made to so nearly resemble butter as to be easily and, when not distinctly marked, usually mistaken for it, and that it may be and often is manufactured from such material and in such manner as to be deleterious to health. With this general statement we proceed to consider seriatim the objections and defenses before stated.

1. The constitutionality of the several acts. What is their purpose and scope? At the outset it should be understood that the statutes do not undertake to prohibit the manufacture or sale of oleomargarine; on the other hand, their expressed purpose, gathered from text and title as well, is to regulate its manufacture and sale. In substance they provide that no one shall manufacture for sale any article in imitation of butter, or any compound or substance or any human food in imitation or semblance of natural butter

which is not pure butter; that no one shall manufacture or offer or expose to sale any oleomargarine which contains any coloring matter; that no one shall sell any substance purporting, appearing, or represented to be butter, or having a semblance of butter, unless it be under its true name and with proper mark designating such name, and that all persons dealing in food shall, upon proper application and tender of price, furnish a sample suitable for analysis.

Construed with that part of section 2 of the act of March 7,
33 1890, which provides that oleomargarine may be manufactured "in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look or appear to be butter," it becomes entirely manifest that this legislation is regulation, not prohibition. So that we may leave out of consideration that portion of the argument which seeks to establish on the one hand and deny on the other a right in the State to directly prohibit its sale or legislate so as to reach that result by indirection. The question therefore is, Do the sections of the statute quoted or any of them violate our bill of rights, which guarantees the right of acquiring and protecting property, or do they in any way violate the constitution as being subversive of the constitutional right to liberty and the enjoyment of property? In other words, Is it within the legislative competency to establish regulation for the prevention of fraud and deceit in the sale of articles of food?

We are of the opinion that the question is not an open one in Ohio. This court had held again and again that the police power of the State is properly exercised in the protection of the people in all matters concerning their health, and that it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to so manufacture and sell is a natural right guaranteed by the constitution. Conceding that, where the
pursuit rests upon the natural right and the product is not
34 harmful, this power may not be exercised in a way which will result practically in inhibition, though under the guise of regulation, and in fostering the interests of a rival product, yet, where the manufacture is conducted in such a way as is calculated to deceive, lead the buyer to suppose he is purchasing an article of food which is everywhere recognized as wholesome, and especially where the article sought to be regulated may easily be manufactured so as to be harmful and thus result in fraud upon and injury to the public, the police power is properly exercised in the regulation of the manufacture and sale of such article by such requirements as will tend to insure the public against fraud and injury. Its proper disposition is not forbidden. As stated in Jordan *v.* Overseers, *infra*, the owner "has power to mortgage the property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs and regulated by laws which render it subservient to the general welfare." These several statutes, framed to accomplish this end, entail no particular hardship, are reasonable in their requirements, and

do not contravene any section of the constitution; nor is there any question whatever in regard to the power of the State to compel a sample for analysis of any article of food. It would be a waste of space to argue the matter. We hold that in that particular also the statute is reasonable and just. Jordan *v.* Overseers, 4 Ohio, 295; The State *v.* Ruedy, 57 Ohio St., 224. Authorities to the
35 same point are numerous, but not necessary. However, we call attention to a recent utterance of the Supreme Court of the United States in Gundling *v.* Chicago, which involved the right of the city to forbid the sale of cigarettes without a license, opinion by Mr. Justic- Peckham:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulation shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of citizens are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. * * * So long as the State law authorizes both regulation and taxation it is enough, and the enforcement of the ordinance violates no provisions of the Federal Constitution."

2. The remedy by criminal prosecution. It is enough to say if this objection that the remedy is not adequate. The object
36 of the statute is to protect the public. In the nature of things, a small fine is not a sufficient deterrent to accomplish the desired end, especially in the case of a company possessed of ample means and conducting a large business. The difference between the price at which butter may be manufactured and sold and that at which oleomargarine may be afforded is so large that the temptation to impose upon the public is too great to be resisted. In addition to this, there are practical difficulties in obtaining convictions which the experience of the dairy and food commissioner, as shown by his report, a public document, fully attests.

3. The right to manufacture and sell oleomargarine not a franchise, and hence the proceeding of *quo warranto* not a proper remedy. It would seem a sufficient answer to this proposition to say that if it be true, then the defendant has no franchise whatever. It- charter, the certificate of the secretary of state, gives it "the right, privilege, and franchise of manufacturing, selling, and dealing in oleomargarine," etc., etc. This authority carries the implication that the business must be conducted in conformity to the laws of the State. It could not have been the intent of the General Assembly in the enacting laws permitting *permitting* the formation of corporations to give them power to override the State, although

the conduct of the officers of the defendant would seem to imply that they have entertained a different opinion. The time has not yet arrived when the created is greater than the creator, and
37 it still remains the duty of the courts to perform their office in the enforcement of the laws, no matter how ingenious the pretexts for their violation may be nor the power of the violators in the commercial world.

In the present case the acts of the defendant have been persistent, defiant, and flagrant, and no other course is left to the court than to enter a judgment of ouster and to appoint trustees to wind up the business of the concern.

Judgment accordingly.

Office of supreme court reporter.

COLUMBUS, OHIO, *April* 16, 1900.

I do hereby certify the foregoing to be a true and correct copy of the original opinion as the same is on file in my office, but it is subject to revision and addition by the judges until published in the official reports.

E. O. RANDALL,
Supreme Court Reporter.

38 STATE OF OHIO, *City of Columbus,* } ss:

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that E. O. Randall, whose certificate is hereto attached, was at the date of the rendering of the above opinion and now is the legally appointed and qualified reporter of said supreme court of Ohio.

In witness whereof I have hereunto set my hand *the* affixed the seal of said supreme court this 20th day of April, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN T. DANA, *Deputy.*

39 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the supreme court of Ohio, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The State of Ohio *ex rel.* Attorney General and The Capital City Dairy Company, a manifest error hath happened, to the great damage of the said The Capital City Dairy Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and

openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19th day of April, 1900, in the year of our Lord one thousand nine hundred.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.,
By C. P. WHITE,
Dep. Clerk.

Allowed & approved by me.
JOHN A. SHAUCK,
Chief Justice of the Supreme Court of Ohio.

[Endorsed:] United States circuit court, southern dist. of Ohio, E. D. No. —. The State of Ohio *ex rel.* Attorney General *v.* The Capital City Dairy Company. Writ of error.

40 THE UNITED STATES OF AMERICA, *ss:*

To the State of Ohio *ex rel.* Attorney General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The State of Ohio *ex rel.* Attorney General is plaintiff and The Capital City Dairy Company, a corporation, is defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable John A. Shauck, chief justice of the said supreme court of Ohio, this — day of April, in the year of our Lord one thousand nine hundred.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of Ohio.

Service by copy of the above citation is hereby acknowledged this — day of April, A. D. 1900.

J. M. SHEETS,
Attorney General.

THE STATE OF OHIO,
By GEO. K. NASH, *Governor.*

[Endorsed:] United States — court. No. —. The State of Ohio *vs.* The Capital City Dairy Co. Citation to defendant in error.

41 Supreme Court of Ohio.

THE STATE OF OHIO *ex Rel.* ATTORNEY GENERAL, Plaintiff,
vs.
THE CAPITAL CITY DAIRY COMPANY, a Corporation, Defendant. } Bond.

Know all men by these presents that we, The Capital City Dairy Company, a corporation, as principal, and William D. Park and Howard C. Park, as sureties, are held and truly bound unto the plaintiff above named in the sum of forty thousand ($40,000) dollars, to be paid to the said plaintiff; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated the 19th day of April, A. D. 1900.

Whereas judgment in the above-entitled case was rendered on the 10th day of April, 1900, ousting the defendant from its corporate franchises and appointing trustees to take possession of all the property and assets of defendant for and on behalf of the creditors and stockholders of defendant, and ordering said trustees to administer said estate, as required by law; and

Whereas the above-named defendant, The Capital City Dairy Company, is desirous of suing out a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled case by the supreme court of the State of Ohio:

42 Now, therefore, the condition of this obligation is such that if the above-named The Capital City Dairy Company shall prosecute said writ to effect and shall answer all costs and damages and shall have the property and assets of said defendant forthcoming to answer the judgment of this court if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Done this 19th day of April, A. D. 1900.

THE CAPITAL CITY DAIRY CO.
HENRY C. PIRRUNG, *Secretary.*
WILLIAM D. PARK. [SEAL.]
HOWARD C. PARK. [SEAL.]

The sufficiency of the above obligation is approved this 19th day of April, A. D. 1900.
[SEAL.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*
JOHN A. SHAUCK,
Chief Justice Supreme Court.

CLERK'S OFFICE, SUPREME COURT OF OHIO.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify the foregoing bond to be a true and correct copy of the original bond on file in this office and approved by Hon. John A. Shauck, chief justice of the supreme court of Ohio, and transmitted

herewith, in the case of the State of Ohio *ex rel.* Attorney General against The Capital City Dairy Company.

Witness my signature and the seal of said court this 20th day of April, A. D. 1900.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By JOHN P. DANA, *Deputy*.

43 Supreme Court of the United States, of October Term, in the Year of Our Lord Nineteen Hundred.

THE CAPITAL CITY DAIRY COMPANY, a Corporation, Plaintiff in Error,
vs.
THE STATE OF OHIO *ex Rel.* ATTORNEY GENERAL, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Capital City Dairy Company, a corporation, by Thomas E. Steele, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio, passed March 7th, 1890, entitled "An act to prevent deception in the sale of dairy products and preserve the public health," was not in violation of nor repugnant to the Constitution of the United States in any of the particulars as claimed by the said plaintiff in error, and further erred in deciding that said act of the General Assembly of the State of Ohio passed March 7th, 1890, was and is valid and binding upon said plaintiff in error.

44 2. The supreme court of the State of Ohio erred in holding and deciding that an act of the General Assembly of the State of Ohio, passed May 16th, 1894, and entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio," is not in violation of nor repugnant to the Constitution of the United States in any of the particulars claimed by the said plaintiff in error, and further erred in deciding and holding said act of the General Assembly of the State of Ohio passed May 16th, 1894, was and is valid and binding upon said plaintiff in error.

3. The supreme court of the State of Ohio erred in holding and deciding that an act of the General Assembly of the State of Ohio passed May 17th, 1886, entitled "An act to prevent adulteration of and deception in the sale of dairy products," as amended by the act of March 21st, 1887, entitled "An act to amend section- 1, 6 and 7 of an act passed May 17th, 1886, entitled 'An act to provide against the

adulteration of food and drugs,'" is not in violation of nor repugnant to the Constitution of the United States in any of the particulars as claimed by the said plaintiff in error; and further erred in holding and deciding that said act of the General Assembly of the State of Ohio passed May 17th, 1886, as amended March 21st, 1887, was and is valid and binding upon said plaintiff in error.

4. The supreme court of the State of Ohio erred in holding and deciding that section four of an act of the General Assembly of the State of Ohio passed March 20th, 1884, entitled "An act to provide against the adulteration of food and drugs," is not in violation of nor repugnant to the Constitution of the United States.

45 The supreme court of the State of Ohio further erred in holding and deciding that the proceeding in *quo warranto* as prosecuted and decided was not in *controversy* of the Constitution of the United States.

And the said The Capital City Dairy Company, a corporation, prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by reason of the said judgment.

THOMAS EWING STEELE,
Attorney for Plaintiff in Error.

[Endorsed:] No. —. Supreme Court of the United States. The Capital City Dairy Company, a corporation, plaintiff in error, *vs.* The State of Ohio *ex rel.* Attorney General, defendant in error. Thomas Ewing Steele, attorney for plaintiff in error.

Endorsed on cover: File No., 17,727. Ohio supreme court. Term No., 257. The Capital City Dairy Company, plaintiff in error, *vs.* The State of Ohio *ex rel.* Attorney General. Filed April 23d, 1900.

No. 257
Br. of Steele for P. & E. Co. Ohio.

Office Supreme Court U.S.
FILED
JAN 18 1901
JAMES H. McKENNEY,
Clerk.

Filed Jan. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 257.

THE CAPITAL CITY DAIRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO EX REL. ATTORNEY GENERAL.

BRIEF CONTRA MOTIONS TO DISMISS OR AFFIRM.

THOMAS EWING STEELE,
Attorney for Plaintiff in Error.

(17,727.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-17-'01

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 257.

THE CAPITAL CITY DAIRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO EX REL. ATTORNEY GENERAL, DEFENDANT IN ERROR.

BRIEF CONTRA MOTIONS TO DISMISS OR AFFIRM.

The motion to dismiss the writ of error herein relies not upon the proposition that no Federal question was raised and decided in the supreme court of Ohio, but rather upon the contention that the case might have been decided upon some other ground.

A number of cases are cited, all of which state in different language the doctrine laid down by this court, speaking through Mr. Chief Justice Fuller, in Cook County *vs.* Canal Company, 138 U. S., 651, as follows:

"The rule is settled that to give this court jurisdiction, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State, having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment given could not have been given without deciding it."

In Harrison *vs.* Morton, 171 U. S., 38, while a Federal question might have been raised in the record, certain controlling questions of fact were also submitted and decided in the court below, and Mr. Justice McKenna, in delivering the opinion of the court, 171 U. S., 46, said:

"Assuming therefore that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery."

In Seeberger *vs.* McCormick, 175 U. S., 274, cited by movant, no Federal question was, in fact, presented to the supreme court of Illinois, and the case turned entirely on questions of general law; while in Capital City Bank of Lincoln *vs.* First National Bank of Cadiz, 142 U. S., 425, no Federal question was mooted until, upon a motion for rehearing, after the case had been decided.

The argument presented, however, by the defendant in error in support of its motion to dismiss the writ of error contends for a summary judgment upon matters to which the plaintiff in error is entitled to be fully heard.

In Murdock *vs.* Memphis, 20 Wall., 590, 628, it is said:

"It has been many times decided by this court on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised

and presented to the court by pleadings, prayers for instructions or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached and we must hear the case on its merits."

In The American Sugar Refining Company *vs.* State of Louisiana, recently decided, but not yet published in the official reports, this court, speaking through Mr. Justice Brown, said:

"Motion was made to dismiss the writ of error upon the ground that the case did not present a Federal question, inasmuch as 'the question of illegal discrimination was not the principal matter litigated, but was put in the record for the purpose of obtaining this writ of error.' As, however, the protection of the fourteenth amendment was invoked in the answer, and as this defense is at least plausible upon its face, the motion to dismiss must be denied."

And see Crowell *vs.* Schumacher, 10 Pet., 368, and Furman *vs.* Nichol, 8 Wall. 44, 59.

The supreme court of Ohio, in its judgment in the case below, stated specifically that it was necessary to decide, and that it did decide, that the validity of the various statutes recited in its entry was drawn into question and was held to be not repugnant to the Constitution of the United States, and especially not repugnant to or in contravention of section 8 of article 1 of the Constitution, and that they were not repugnant to or in contravention of the fifth and fourteenth articles of amendment to the Constitution of the United States.

We are aware of the fact that such a finding of the State court, while entitled to great deference, is not binding upon

this court, but the opinion of the State court and the pleadings in the case all demonstrate that the Federal questions were constantly to the fore, and, indeed, the case of Gundling *vs.* Chicago, 177 U. S., 183, is cited in the opinion of the supreme court of Ohio as justifying its judgment that the statutes in question were not repugnant to the Constitution of the United States. (See Record, page 35, 62 O. S., 365.)

It was contended by the defendant in error that the statutes, whose validity was drawn into controversy, only sought to reasonably regulate and not to inhibit the manufacture and sale of oleomargarine.

It was contended by the plaintiff in error that they were in fact prohibitory, although under the guise of regulation, and that their effect was not to protect the public health or to prevent any fraud upon the consumer, but that their apparent and notorious purpose was to build up one industry at the expense of another.

This court has repeatedly pointed out the well-known fact that statutes, apparently for the mere "regulation" of an industry, may desire to, and in fact, destroy it.

Collins *vs.* New Hampshire, 171 U. S., 30.

The direct and necessary result of a statute must be taken into consideration in deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be formed, its purpose must be determined by its natural effect.

Henderson *vs.* Mayor of New York, 92 U. S., 259.

Morgan's Louisiana N. T. R. S. S. Co. *vs.* Louisiana Board of Health, 118 U. S., 455, 462.

Where a statute is relied upon to justify the taking of property from a citizen, whether a corporation or an individual, and the property-owner contends that said statute, by prohibiting a lawful industry, deprives him of his property without due process of law and deprives him of some privilege or immunity to which he is entitled under the Constitution of the United States, the mere ruling by the supreme court of the State that said statute does conform to the National Constitution and is only a reasonable exercise of the police power does not conclude the citizen so aggrieved from having this court determine whether or not the Federal question so mooted is or is not well taken.

"Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide independently of all adjudication by the supreme court of a State, whether or not the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligations could be enforced notwithstanding a contrary conclusion by the supreme court of the State? It never was intended, and cannot be sustained by any course of reasoning that this court should or could with fidelity to the Constitution of the United States, follow the supreme court of a State in such matters, when it entertains a different opinion."

Bridge Proprietors *vs.* Hoboken Company, 1 Wall., 116, 145.

It is contended, however, that the judgment of ouster may have been predicated solely upon a finding against the plaintiff in error of guilty, as set forth in the fourth charge of the petition in *quo warranto*, which reads as follows:

"Said defendant corporation has refused and still refuses to deliver and furnish to the duly appointed, qualified, and

acting inspector and agent of the dairy and food commissioner of this State any sample or quantity of the oleomargarine manufactured by it, although duly demanded by him and the value of the same for a ten-pound package thereof or any other reasonable quantity thereof was tendered it for the analysis thereof, contrary to section 4 of the act of March 20, 1884, entitled 'An act to provide against the adulteration of food and drugs' (81 O. L., 67), and said defendant has refused and still refuses to permit said inspector and agent to enter into its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause to be examined any of the products manufactured by it."

Sufficient answer to this hypothesis might be found by a mere inspection of the syllabi, opinion, and decree of the supreme court of Ohio; but apart from these express stipulations contradicting such hypothesis, there is intrinsic evidence to support and illumine their decision that the question decided and decisive was the validity of the anti-oleomargarine laws.

The refusal to permit the inspector of the dairy and food department to enter its factory and inspect its contents could not possibly have been considered by the State court as a predicate for any judgment against the plaintiff in error.

The inquisitorial powers of the so-called dairy and food department are confined to the commissioner or the assistant commissioners (Bates' Annotated Statutes, sec. 409–7 to sec. 409–9, inclusive). No such powers are conferred upon a mere "inspector;" he is not an officer.

The supreme court of Ohio in State *ex rel.* Reynolds *vs.* The Capital City Dairy Company, 62 O. S., 123, 126, referring to the "inspector," said:

"It is unnecessary to consider how far interference with official action may be prevented by injunction, because the relator is not an officer, but an employé merely, and the petition shows no interference with any official act."

It is urged, however, that section four of the act of 1884 (81 O. L., 67) is a valid law, and that this "fourth charge" relates in part to a violation thereof.

The act in question is the general statute against the adulteration of food and drugs, and the above-mentioned section must be read in connection with the "succeeding" section hereafter referred to. They read as follows:

"SEC. 4. Every person manufacturing, offering or exposing for sale, or delivering to a purchaser, any drug or article of food included in the provisions of this act, shall furnish to any person interested, or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession."

"SEC. 5. Whoever refuses to comply, upon demand, with the requirements of section four, and whoever violates any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars nor less than twenty-five dollars, or imprisoned not exceeding one hundred nor less than thirty days, or both. And any person found guilty of manufacturing, offering for sale or selling an adulterated article of food or drug under the provisions of this act, shall be adjudged to pay, in addition to the penalties hereinbefore provided for, all necessary costs and expenses incurred in inspecting and analyzing such adulterated articles of which said person may have been found guilty of selling or offering for sale."

The supreme court of Ohio has repeatedly decided that where a statute is passed making unlawful what was antece-

dently lawful, and imposing a penalty for the violation of such statute, *that the penalty so provided is exclusive* (Commissioners *vs.* Bank, 32 O. S., 194), and in State *ex rel.* Reynolds *vs.* The Capital City Dairy Company, *supra*, it was held that the State's remedy against violators of this section was exclusively by indictment.

State *ex rel. vs.* Capital City Dairy Co., 62 O. S., 123.

It is true that there are some dicta to the effect that the violation of this statute by a corporation might furnish ground for a proceeding in *quo warranto;* but, under our practice, any proposition of law found in the opinion and not contained in the syllabus is merely an *obiter* of the individual judge who writes it.

Indeed, it would hardly be contended that the refusal to furnish a sample would violate or abuse any corporate franchise. The supreme court of Ohio obtains its jurisdiction in *quo warranto* by favor of section 2, article 4, of the constitution of Ohio, which provides that:

"It shall have original jurisdiction in *quo warranto, mandamus, habeas corpus,* and *procedendo,* and such appellate jurisdiction as may be provided by law."

In Kent *vs.* Mahaffy, 2 O. S., 498, 499, the supreme court of Ohio, speaking through Judge Thurman, said:

"Now, the original jurisdiction conferred upon this court by the constitution is limited to *quo warranto, mandamus, habeas corpus* and *procedendo* (art. 4, sec. 2). This is the only original jurisdiction granted by that instrument, and it would be wholly inconsistent with and in a great measure destructive of the judicial system it ordains to suppose that this original jurisdiction can be enlarged by law."

And in Knapp *vs.* Thomas, 39 O. S., 377, 383, the supreme court of Ohio, speaking through one of its most eminent judges, said:

"By the constitution, article 4, section 2, it is ordained that the supreme court 'shall have original jurisdiction in *quo warranto, mandamus, habeas corpus* and *procedendo*, and such appellate jurisdiction as may be provided by law.'

"The appellate jurisdiction may be large or small, as the legislature in its wisdom may determine; but the original jurisdiction cannot be lessened nor can it be enlarged; the maxim, '*expressio unius est exclusio alterius*' applies."

This proceeding as launched against the plaintiff in error invoked the *original jurisdiction* of the supreme court of Ohio. That jurisdiction was, therefore, such as the general law declared it to be, and could neither be enlarged nor diminished by any legislation.

The refusal of the plaintiff in error to deliver samples was not an abuse of corporate franchises, giving jurisdiction in *quo warranto.*

Spelling on Extraordinary Relief, 1806, 1810.
Spelling on Private Corporations, 961.

As to the other statutes drawn into question, we contend that they contravene section 8 of article 1 of the Constitution of the United States, insomuch as they expressly apply to all the product (oleomargarine) manufactured or offered for sale by the plaintiff in error, without distinction between interstate and intrastate commerce, and that they contravene the provisions of the fifth amendment and of the fourteenth amendment to the Constitution of the United States, for the reason that they clearly abridge the privileges and immuni-

ties of the plaintiff in error and deprive it of its property without due process of law and deny to it the equal protection of the laws extended to others in the same situation within their jurisdiction.

By their express terms it is made unlawful for any person, "by himself or his agent or employee to render or manufacture for sale, out of any animal or vegetable oils not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from unadulterated milk or cream from the same," or to sell and to have for sale or offer for sale any article, substance, or compound made, manufactured, or produced in violation of said section, "whether said original substance or compound shall be made or produced in this State or elsewhere." (See secs. 4200–13, Bates' Annotated Statutes, and being the act of March 7, 1890, 87 O. L., 51, referred to in the *syllabi* and opinion of the supreme court of Ohio; see Record, p. 21.)

By section 4200–14 natural butter is defined as butter "manufactured exclusively from pure milk or cream or both, with salt, and with or without any harmless coloring matter."

By the provisions of the act of May 16, 1894, which is quoted in the opinion of the supreme court of Ohio (see Record, p. 21), it is provided:

"No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver any oleomargarine which contains any methley (methel) orange, butter yellow, anatto, analine dye, or any other coloring matter."

It is true that there is a provision in section 4200–13 to the effect that:

"It is further provided that nothing in this act shall be construed to prohibit the manufacture and sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredients causing it to look like or appear to be butter, as above defined."

We respectfully call attention to the absurd paradox which permits oleomargarine to be manufactured, *provided it contains no ingredient which causes it to look like or appear to be butter.* This tail was assumed by the statute to give it the appearance of *regulating* instead of *prohibiting* the manufacture and sale of oleomargarine.

Prescinding from the matter of color, every ingredient used in the manufacture of oleomargarine is used for the express purpose of causing it to look like and appear to be butter. Indeed, oleomargarine and butter are substantially the same thing. They are both manufactured: they contain the same constituents, and as the New York court of appeals very aptly remarked in People *vs.* Marx, 99 N. Y., 377 (cited by this court in Schoelberger *vs.* Pennsylvania, 171 U. S., 1, 11):

"It was proved on the part of the defendant by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of fatty substance known as 'butterine.' That this butterine exists in dairy butter only in a small proportion—from three to six per cent.. That it exists in no other substance than butter made from milk, and it is introduced to oleomargarine butter by adding to oleomargarine stock some milk, cream

or butter, and churning, and that when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in the butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent. of that substance, while dairy butter might contain four or five per cent., and that, if four or five per cent. of butterine were added to oleomargarine, there would be no difference: it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist, who had been employed by the French government to devise a substitute for butter."

Oleomargarine has the general appearance, taste, and consistency of ordinary butter. They are so identical that neither by sight, smell, taste, nor microscopic examination can they be infallibly distinguished. Indeed, the only method now relied upon to distinguish one from the other is to pursue what is known as the Reichard test, which, briefly stated, consists in ascertaining the number of cubic centimetres of alkali required to neutralize the volatile acids of the sample under investigation after the water, salt, and casein have been eliminated. No ingredient is found in the butter which is not found in oleomargarine, and no ingredient is found in oleomargarine which is not found in butter.

A proviso, therefore, which permits the manufacture of oleomargarine under the condition that it has no ingredient causing it to look like or appear to be butter is a proviso which must have been inserted by a professional humorist.

The statute as it stands utterly forbids the manufacture of any substance "out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter," or to "sell, keep for sale or offer for sale any article, substance or compound made, manufactured or produced in violation of said section," whether said article, substance, or compound be made or produced in Ohio or elsewhere. We here append for convenience the full text of the act of March 7, 1890:

"No person, by himself or agent, or his employee, shall render or manufacture for sale out of any animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese, produced from unadulterated milk or cream from the same, nor compound with, or add to milk, cream or butter any acids or other deleterious substance, or animal fats or animal or vegetable oils not produced from milk or cream, so as to produce any substance, or any human food, in imitation or semblance of natural butter or cheese, nor shall sell, keep for sale or offer for sale any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this State or elsewhere.

"For the purpose of this act, the terms 'natural butter' and 'cheese,' 'natural butter or cheese produced from pure, unadulterated milk or cream from the same, butter and cheese made from unadulterated milk or cream, butter or

cheese, the product of the dairy,' and butter or cheese shall be understood to mean the products usually known by the terms butter and cheese, and which butter is manufactured exclusively from pure milk or cream or both, with salt, and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream or both, with salt and rennet and with or without any harmless coloring matter or sage. It is further provided that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine, in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look like or appear to be butter, as above defined."

The only possible relief the oleomargarine-maker could find if he desired to exist in Ohio would be to color his product some other color entirely different from butter, and thereby strive to make it appear different from butter, but that he is forbidden to do by the act of May 16, 1894, which provides:

"No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine, which contains any methley (methel) orange, butter yellow, anatto, analine dye, *or any other coloring matter.*"

These acts of the legislature coming on to deal with butter and oleomargarine, two substantially identical products, undertake to say:

First. *Butter* may be freely manufactured and sold, and it may be colored so as to make it more attractive to the purchaser.

Second. *Oleomargarine* shall not be manufactured at all if it contains any ingredient which causes it to look like or appear to be butter.

Third. It (oleomargarine) shall not be colored with any matter, however harmless, to present such otherwise unavoidable resemblence.

Now, oleomargarine being a wholesome, nutritious, and necessary article of food, all citizens have a right to make and sell it freely, subject to reasonable police regulation. If, under guise of regulation, its manufacture and sale is virtually made impossible, and if those who make it and sell it are, without necessity or reason, forbidden to make it in the manner and from the same material as it is everywhere made the world over, the persons whom these oppressive, prohibitory, and discriminatory laws oppress are entitled to say that they are being deprived of the equal protection of the laws; that their property is being taken from them without due process of law; that they are not enjoying the equal protection of the laws with their fellow-citizens, and are therefore being deprived of their privileges and immunities as citizens of the United States, and thereby entitle themselves to the attention and ruling of the courts of the United States, and if said laws are upheld as not repugnant to the Constitution of the United States by the highest court of any State they are entitled to a writ of error from this court to inquire into their grievances that speedy justice may be done in that behalf.

The motion to dismiss we therefore insist should be overruled, and for reasons hereinafter briefly stated the motion to affirm should likewise be denied.

AS TO THE MOTION TO AFFIRM.

We deny that the defendant in error's motion to dismiss has sufficient merit to cause this court to summarily examine the record to find reason for affirming the judgment below; we are unwilling to admit "that the contention of plaintiff in error * * * has been often pressed upon the court, and as often determined adversely."

Gundling *vs.* Chicago, 177 U. S., 183, simply decided that a license levied upon the business of selling cigarettes was not an unreasonable exercise of the police power. It might be sufficient to say that the boundaries between the liberty of the citizen and the police power of the State are so difficult to define that the majority of cases can only be decided as they happen to come before the court. Adjudications are multitudinous and any effort at exhaustion would only be a matter of subjective satisfaction.

Powell *vs.* Pennsylvania, 127 U. S., 678, decided that a State might lawfully prohibit the manufacture and sale of oleomargarine. It affirmed the case, Commonwealth *vs.* Powell, 114 Penn., 265, which in turn relied for support upon Addington *vs.* State, 77 Mo., 110.

The last-named case was decided in 1882; it was based upon an assumption which, if then proper, is now certainly absolutely untrue. The court say:

"Noticing judicially, things which are of common knowledge we know that the people will not knowingly eat this counterfeit article (oleomargarine), and that it cannot be sold to those who buy butter for their personal consumption, except under the belief that it is real butter."

Even then the supreme court of Pennsylvania divided, and upon the matter of affirmance in this court Mr. Justice Field dissented.

It may not be improper to note that the New York court of appeals, in People *vs.* Marx, 99 N. Y., 377, reached an opposite conclusion, and the opinion of this court was not followed by universal intellectual submission. (See Dillon on Municipal Corporations, sec. 141.)

In Plumley *vs.* Massachusetts, 155 U. S., 480, this court affirmed the supreme judicial court of Massachusetts in upholding the statute which prohibited the coloring of oleomargarine in imitation of yellow butter. It will be remembered, however, that two of the four judges who heard the case in Massachusetts dissented from the judgment of the State court, and that upon the question of affirmance in this court Mr. Chief Justice Fuller, together with Mr. Justice Field and Mr. Justice Brewer, dissented.

In Schoellenberger *vs.* Pennsylvania, 171 U. S., 1, this court held that the prohibitory laws of Pennsylvania could not extend to oleomargarine imported into the State and sold in the original package to the consumer, and in Collins *vs.* New Hampshire, 171 U. S., 30, it was at the same time held that as to interstate commerce the "pink laws" of New Hampshire were of no effect. Since then the court of appeals of Maryland in two cases has followed these decisions, and their scope has been followed and possibly enlarged by the decision of Judge Lochren in the case of *In re* Brundage, 96 Federal Reporter, 963.

We are of the opinion that the Federal question is sufficiently raised in this case to entitle us to be heard, and that

this case ought not to be summarily affirmed. We appreciate that there are reasons why we should not, on a motion of this kind, discuss at length the previous decisions of this court.

We recognize that it is discretionary with the court to allow us to be heard, and that any insistance or prolonged argument upon our part at this time might be inappropriate. We respectfully urge, however, the following considerations:

First. The Ohio statutes, by their express terms, discriminate against and substantially prohibit the manufacture of oleomargarine, whether it be an object of interstate or intrastate commerce.

Second. They expressly permit the manufacturer of butter to color his product, yet make it criminal for the manufacturer of a similar product to do likewise.

Third. The judgment confiscating the property of the plaintiff in error, through the guise of a proceeding in *quo warranto*, and under pretense that the doing of certain acts or their omission constitute an abuse of corporate franchises, when corporate franchises were not and could not have been required either for their performance or omission, as urged in the seventh defense of our answer filed in the supreme court of Ohio, is an authority exercised by the State of Ohio in contravention of the Constitution of the United States, and works a denial to the plaintiff in error of rights and immunities guaranteed all citizens of the United States,

and extended to all citizens other than the plaintiff in error, within the jurisdiction of the State of Ohio.

Many of the questions mooted in our record are of interest not only to the plaintiff in error, but to many others engaged in business and to the multitude of poor people who desire the privilege of being allowed to eat any wholesome food that they desire to eat and are able to buy.

The legislation complained of is very similar to that denounced by the New York court of appeals in People *vs.* Gillison, 109 N. Y., 389, where it is said:

"The statute referred to is one of that kind, which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free and full competition of some other class; members of the former class, thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment, which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."

The spirit which permeates this anti-oleomargarine legislation is a spirit of bigotry, unfairness, and oppression. It affects not only the people who manufacture or sell oleomargarine, but it affects all citizens who, to the extent that these laws operate, are deprived of their freedom.

In the whole history of the anti-oleomargarine legislation *no consumer* has ever asked for any legislation. The legislation procured has been procured in the same cold-blooded manner that the owner of an artificial gas plant in a city

might procure the passage of an ordinance making it a crime to manufacture or sell electric light.

"Liberty is the freedom from all restraints but such as are justly imposed by law; beyond that line lies the domain of usurpation and tyranny."

Respectfully submitted.

THOMAS EWING STEELE,
Attorney for Plaintiff in Error.